No. 1042 103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

AGAINST

ADLER'S CREAMERY, INC.,
Defendant-Petitioner.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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JEFFREY PRESS, INC.

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PETITION.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable Justices of the Supreme Court of the United States of America:

The petition of Adler's Creamery, Inc. respectfully alleges:

1. That your petitioner is a corporation organized and existing under the laws of the State of New York, having its office and principal place of business in the village of Fort Plain, Montgomery County, New York.

2. That your petitioner is engaged in the business of operating a milk receiving plant at Fort Plain, New York, in which it receives milk produced by farmers in the vicinity; that your petitioner also handles milk produced by farmers in the vicinity of Herkimer, Herkimer County, New York, delivered to a similar plant in that village; that all milk handled by your petitioner has been produced within the State of New York and has always been delivered to the aforesaid plants by the producers in the neighborhood and such production and delivery has been wholly intrastate.

3. That after testing and cooling, the milk received by your petitioner is transported by tank trucks, routed wholly within the State of New York, into the City of New York where it is delivered to an associated company, Samuel Adler, Inc., a milk dealer who sells such milk, after pasteurizing and bottling, to store-keepers, restaurants and other distributors for consumption within the City of New York.

4. That in the course of its handling, from producer to final consumption, your petitioner's milk is never physically in contact with, or intermingled with, milk which might be characterized as "interstate" milk, viz.: milk which is either produced outside the State of New York or which, if produced within the State, finds its way into the market through interstate channels, or by the use of interstate facilities.

5. That on August 5th, 1938, the Secretary of Agriculture of the United States issued an order, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, known as Order No. 27; that on August 25th, 1938, the Commissioner of Agriculture and Markets of the State of New York issued an order pursuant to the provisions of Section 258-m of the Agriculture and Markets Law of the State of New York, known as Order No. 126; that each of said orders, in similar terms, seeks to regulate the handling of milk approved for sale in the New York City milk marketing area; that the Federal Order affects such handling "as is in the current of interstate commerce or which directly burdens, obstructs or affects interstate commerce"; that the State Order applies generally to the handling of milk not within the purview of the Federal Order.

6. That the Federal Order provides that it is to become effective concurrently with the State order "to which this order shall be complementary" (Art. X, § 1); that both orders by their terms became effective on September 1,

1938; that official copies of the said Orders are incorporated in the record, the Federal Order at page 11, and the State Order at page 61.

7. That the material terms of the Federal Order (with which the terms of the State Order are identical) were summarized by this Court in its opinion in the case of *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, in which opinion, also, the pertinent provisions of the law are set forth; that the Orders sought to bring about the payment of a uniform price to each producer of milk approved for sale in the marketing area by means of a formula substantially as follows: Milk is classified according to its utilization. Milk shipped in fluid form (called Class I milk) commands a higher price than milk used for other purposes, such as cream, cheese, butter and other dairy products. A market administrator appointed pursuant to the Order is required to compute the total price of all milk in the various classes on the basis of reports of utilization. He then computes a weighted average, subject to numerous adjustments, and fixes a uniform price to be paid to all producers. Those handlers whose milk is used largely in fluid form and thus should pay more than the uniform price, pay such uniform price to their producers and, in addition, pay the difference between the uniform price and the stated value of their milk into a "producer settlement fund" (usually called the "pool"). Handlers whose utilization of milk in lower classifications brings their stated price below the uniform price receive such difference from the pool and remit to their producers such uniform price.

8. That the utilization of the milk handled by your petitioner is ordinarily, to a large extent, fluid or Class I utilization and the classified value of such milk handled by your petitioner exceeds the uniform price.

9. That when the State and Federal Orders became effective, your petitioner fully complied therewith and paid

into the pool for the months of September and October, 1938, sums aggregating $44,527.48; that during that time the wholesale market for milk in the City of New York gradually became depressed and dropped rapidly from 9¾¢ per quart to as low as 8¢ per quart.

10. That the following facts appear from the Government's own proof in this suit; viz., that, in order to comply with the order at a reasonable profit, a wholesale market of 9¾¢ per quart is necessary (record, fol. 47); that when the United States District Court declined to grant a preliminary injunction in the *Rock Royal* case, enforcement of the Federal Order became impossible and that "price-cutting gradually accelerated and continued unabated until after the decision of the Supreme Court upholding the validity of Order No. 27" (record, fol. 50); that "other handlers were forced to meet these prices in order to retain their business and the general level of prices dropped to disastrously low levels" (ibid); that "the failure of summary enforcement against the defendants (in the *Rock Royal* case) together with the resulting disorderly marketing conditions made effective enforcement against other handlers impossible" (fol. 51); that, as a result, after the adverse decision of the District Court in the *Rock Royal* case, the Orders were suspended as of January 31st, 1939.

11. That by reason of the said conditions existing during the period from November 1st, 1938, to January 31st, 1939, compliance with the terms of the Order by your petitioner, as well as by virtually all other handlers of fluid milk, became impossible and your petitioner was unable to pay the "pool obligation" for those months; that the record shows beyond question that your petitioner conducts its business in a most efficient and economical manner and that the inability of your petitioner to pay the minimum price was solely the result of such market conditions and not of any competitive disadvantage by reason of inefficiency or lack of skill or experience.

12. That your petitioner at no time has been responsible in any way for the demoralized market conditions; that, on the contrary, your petitioner was called upon by the Government to prove by affidavit in the *Rock Royal* case that the activities of the defendants in that case in marketing their milk in disregard of the Order and in failing to pay into the pool had created market conditions which made compliance by your petitioner and other handlers impossible.

13. That after the decision by this Court in the case of *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, the Federal and State Orders were reinstated as of July 1st, 1939, and promptly thereafter the Government brought suit against your petitioner for a mandatory injunction to compel your petitioner to pay to the Market Administrator the "pool obligation" for the milk handled by your petitioner in November and December, 1938, and January, 1939, a period during which the Federal and State Orders were not being enforced against handlers generally and during which period they were not being complied with by most handlers. Such claim against your petitioner amounts to the sum of $46,618.67.

14. That promptly after the commencement of this suit by the Government, the Commissioner of Agriculture and Markets of the State of New York applied for leave to intervene and, upon permission granted, filed a complaint setting forth, in substance, that your petitioner is a handler within the definition of the State Order and is subject to the terms of that Order, and praying for enforcement of the State Order against your petitioner.

15. That your petitioner opposed the suit of the Government seeking to enforce the Federal Order against it, on the ground, among others: (1) that your petitioner's operations are not in interstate commerce and do not directly burden, obstruct or affect interstate commerce and are not, and cannot properly be, within the purview of

the Federal Order; and (2) that market conditions which prevailed during the three months' period preceding the suspension of the Order made enforcement thereof at that time confiscatory, in violation of the due process clause of the Fifth Amendment to the United States Constitution.

16. That upon the motion for preliminary injunction made at the time of the commencement of this suit, the United States District Court for the Northern District of New York made an order, in mandatory form, requiring your petitioner to pay to the Market Administrator the sum of $46,618.67; that the Circuit Court of Appeals for the Second Circuit reversed that order upon the sole ground that such injunctive relief might not properly be granted as a preliminary order, with an opinion, reported in 107 Fed. (2nd) 987, in which the Circuit Court of Appeals indicated that it interpreted the decision of this Court in the *Rock Royal* case to mean

> "that milk which has not crossed a state line but which is distributed in a marketing area in such a way that its marketing is merely part of what is from the public standpoint one marketing operation, which includes interstate milk, may be the subject of federal regulation whenever that is necessary to prevent a direct burden upon or obstruction to the coming of interstate milk into the marketing area";

that the Circuit Court of Appeals, so construing the decision of this Court in the *Rock Royal* case, held that your petitioner's activities, even though wholly within the State of New York, and affecting milk handled exclusively within the State and free from contact with interstate milk, might be subject to the Federal Order by reason of the fact that such milk was sold in the New York City market in competition with such interstate milk; that the opinion of the Circuit Court of Appeals further indicated that the enforcement of the Order during the period of demoralized market conditions would not violate the due process clause

of the Fifth Amendment; that "though it may have been a hard choice" your petitioner was at liberty to conduct its business in compliance with the Order, although at a prohibitive loss, or to cease doing business, or to continue its business without compliance and run the risk of the consequences; that in support of its holding that the enforcement of the Order did not infringe upon your petitioner's constitutional rights, the Circuit Court of Appeals cited the case of *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163.

17. That the Government, having previously moved for summary judgment, applied to the District Judge immediately for an order on such motion; that the District Court granted such motion and entered a final decree directing the defendant to pay to the Market Administrator the sum claimed by the Government, to wit, $46,796.66 (record, p. 77).

18. That upon appeal to the Circuit Court of Appeals, that Court affirmed the decree appealed from with a *per curiam* opinion referring to its earlier determination on the appeal from the order granting a preliminary injunction.

19. That this Court has jurisdiction to review the judgment of the Circuit Court of Appeals, this petition being for a writ of certiorari to the said Court authorized by Section 240(a) of the Judicial Code as amended (28 U. S. C. A., Section 347).

20. That the questions presented are:

> (a) whether or not the Secretary of Agriculture of the United States, acting under the Agricultural Marketing Agreement Act of 1937, may regulate the marketing of milk produced within the State of New York and handled and marketed wholly within that state, without physical contact or commingling with "interstate" milk, solely by reason of the fact that it is ultimately sold in the City of New York in competition with such "interstate" milk;

(b) whether or not the provisions of Order No. 27 fixing the minimum price to be paid by handlers to producers for Class I milk (for fluid consumption) do violence to the due process clause of the Fifth Amendment during periods when the prescribed price exceeds the prevailing wholesale market price at which such milk can be resold.

21. Your petitioner respectfully urges that this case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons:

1. Because an important and vital question of law is involved touching upon the scope of the Federal power, under the Commerce Clause, over wholly intrastate activities which has not been the subject of direct determination by this Court in any similar case.

2. Because the *Rock Royal* case has given rise to uncertainty as to whether such wholly intrastate activities in the handling of milk are within the sphere of Federal control where the milk so handled does not use facilities of interstate commerce and is not physically or inextricably intermingled with interstate milk but is produced for sale in the marketing area in competition with interstate milk. Such uncertainty arises out of the fact that the milk of the handlers in the Rock Royal case was concededly transported to the New York City market in interstate commerce and hence stood on a different footing from the milk handled by your petitioner. The uncertainty is evidenced by the position taken by the State Commissioner of Agriculture and Markets that such handling by your petitioner is within the scope of the concurrent State Order, rather than of the Federal Order.

3. Because the determination sought to be reviewed involves a vital question of constitutional law touch-

ing upon the due process clause of the Fifth Amendment to the United States Constitution which has not been heretofore determined by this Court under similar facts.

WHEREFORE, your petitioner respectfully prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring this cause to this Honorable Court for such proceedings as may be just.

Dated, New York, May 12th, 1940.

ADLER'S CREAMERY, INC.,
By SAMUEL ADLER,
President.

SAMUEL RUBIN,
Attorney for Petitioner.

State of New York,
County of New York—ss.:

SAMUEL ADLER, being duly sworn, deposes and says: that he is the president of Adler's Creamery, Inc., the petitioner herein; that he has read the foregoing petition; that the same is true to his own knowledge, information and belief; that his knowledge is derived from the record in this case and facts with which he is personally acquainted.

SAMUEL ADLER.

Sworn to before me this
12th day of May, 1940.

MARY GLICK,
Notary Public, Kings County.
Kings Co. Clk's No. 350, Reg. No. 2382.
Cert. filed N. Y. Co. Clk's No. 966, Reg. No. 2G575.
Commission expires March 30, 1942.

SUPPORTING BRIEF.

Basis of Court's Jurisdiction.

Jurisdiction in this Court arises under Section 240(a) of the Judicial Code, this being a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a final judgment or determination of that Court which is subject to review by certiorari.

The Statutory Provisions Involved.

This petition involves an order of the Secretary of Agriculture of the United States known as Order No. 27, issued under the Agricultural Marketing Agreement Act of 1937. The pertinent provisions of that Statute were set out in this Court's opinion in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533. The Order in question was also before this Court in that case and its terms summarized in the Court's opinion. An official copy of the order is part of the record submitted herewith (transcript of record, p. 11). A brief statement of the method adopted under the terms of the Order to create a uniform price to producers is found in Paragraph "7" of the foregoing petition.

The Questions Presented.

Two questions of vital importance to the milk industry are presented by this petition:

I.

(a) May the Secretary of Agriculture, acting under the Agricultural Marketing Agreement Act of 1937, properly issue an order regulating the marketing of milk produced within a given state and handled throughout its existence within the confines of that state, without the use of facilities of interstate commerce, and without commingling or physical contact with "interstate" milk, where

the sole ground for invoking federal jurisdiction is that such milk is sold in competition with such "interstate" milk?

(b) Subordinate to the foregoing question is one of construction: viz., whether Order No. 27, read in the light of the provisions touching upon the concurrent State Order and the manifest purpose to permit the State to retain control of "intrastate" milk, should not have been construed to effectuate that intention rather than to embrace within Federal control all milk produced for sale in the marketing area.

II.

When minimum prices required to be paid to producers as fixed by the Order exceed the market price at which such milk can be resold, does not such Order violate the due process clause of the Fifth Amendment of the United States Constitution?

Argument.

Both of the questions so raised were presented to the Circuit Court of Appeals. In the opinion of that Court, favorable consideration thereof was precluded by rulings of this Court.

The question of the scope of Federal power under the Commerce Clause was held to be determined by this Court in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533.

The question of due process, so raised, was held to be determined by this Court in *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163.

The petitioner, for the reasons herein outlined, urges that neither of the cases referred to can be said to be controlling and that neither of these questions has been decided by this Court in any case in which such question was presented for determination under comparable facts.

POINT I.

The Federal power under the commerce clause.

(A) The Extent of Federal Power Over Purely Intrastate Transactions.

In the *Rock Royal* case certain expressions in the majority opinion of this Court written by Mr. Justice Reed have been quoted by the Government as conclusively determining that the provisions of Order No. 27 may be equally applicable to so-called "intrastate" as well as to "interstate" milk. The thought underlying such argument is that the competitive situation makes it necessary to control the intrastate product in order to protect the interstate product.

Our contention is that the problem was not presented to this Court in the *Rock Royal* case. Mr. Justice Reed, in that case, at the inception of the opinion, referring to the Federal and State Orders, said (p. 540):

> "The two orders are in pari materia, one covering milk moving in or directly burdening, obstructing or affecting interstate commerce and the other covering milk in intrastate commerce. *Each defendant is a dealer handling milk moving in interstate commerce.*" (Italics ours.)

Further (p. 541):

> *"The state order was eliminated from consideration on the understanding, not questioned here, that the milk of all four defendants is covered by the Federal Order, if valid."* (Italics ours.)

Referring to the scope of Order No. 27, the opinion states (p. 553):

> *"An exception was made as to milk regulated by the order of the Commissioner of Agriculture and Markets of the State of New York."* (Italics ours.)

Further, when the Court commenced the discussion of the question of the constitutionality of the Act, the following statement was made (p. 568):

> *"There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce."* (Italics ours.)

The petitioner urges that the foregoing excerpts from Mr. Justice Reed's opinion demonstrate that, insofar as the general language of the majority opinion embraced the discussion of wholly intrastate milk, the decision was not directly pertinent to the facts presented in the record. The Court was dealing with the intrastate operations of handlers of *interstate* milk.

The present record squarely presents the question whether the Order may be enforced against a handler whose activities are as far removed from any interstate aspects as it is possible for any handling of milk to be. Petitioner's milk flows in its own individual channel, wholly within state lines, free from any physical contact with any other milk, whether interstate or intrastate. Petitioner has its own source of supply within the State. It is transported within the State and sold and consumed therein. Except for the single fact that petitioner's milk is sold in the same market as interstate milk, no possible relationship can be said to exist between petitioner's milk and the milk of those handlers whose product "reaches the marketing area through the channels of interstate commerce".

Concededly, in the course of the discussion, Mr. Justice Reed made statements which, read out of their context, would appear to justify the conclusion of the Circuit Court of Appeals. Those statements cannot be disregarded. Petitioner must accordingly meet the Government's arguments based thereon. Mr. Justice Reed, at the inception of Subdivision "II" of his opinion, and immediately after the

sentence above quoted to the effect that the milk of all the defendants reached the market through the channels of interstate commerce, said (p. 568):

> "Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the Federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines."

The opinion then proceeds to point out the basis of the defendants' challenge to the constitutionality of the Act. Their point was that while, admittedly, their product was "interstate" milk, the incidence of the regulation was on a purely local transaction, viz.: "the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant".

Mr. Justice Reed then proceeded to point out that under a number of decisions of this Court, such local activities may, nevertheless, come within the sphere of Federal control.

We argue:

1. No question was presented with respect to the Federal power over milk, the marketing of which was wholly intrastate. The point raised and passed upon was limited to the power to regulate local activities in the marketing of "interstate" milk.

2. The cases cited by Mr. Justice Reed, in each instance, touch upon the Federal power, under the Commerce Clause, to regulate activities which may, in a narrow sense, be intrastate but which were applied to goods which, in the course of their marketing, flowed in interstate channels or were physically and inextricably commingled with such interstate commodities, as in the case of *Mulford* v. *Smith*, 307 U. S. 38.

(1) THE QUESTIONS PRESENTED IN THE ROCK ROYAL CASE.

The determination of this Court in the *Rock Royal* case on the interstate commerce question did not require the adoption of any broader conception of Federal power than was exemplified in the earlier decisions and, we suggest, this Court had no intention of foreclosing inquiry into the question of the extent of such power over wholly intrastate activities, *as applied to goods whose marketing is completely dissociated from interstate commerce.* The limitations on the Federal power, suggested in the *Schechter* case, 295 U. S. 495, would appear to have some applicability to such issue.

The Circuit Court of Appeals, apparently feeling bound by the broad language in the majority opinion in the *Rock Royal* case, ventured to suggest that petitioner's real hope is "to induce the Supreme Court to limit the *Rock Royal* decision" (107 Fed. 2nd, 987). It is to be noted that it was not suggested that petitioner's contention requires any limitation on the decisions cited in the *Rock Royal* case.

(2) THE CASES CITED IN THE ROCK ROYAL CASE.

In the *Labor Board Cases,* 301 U. S. 1, the defendants were engaged in manufacturing, and the controversies with their employees involved activities wholly within the State. But the Court sustained the power to regulate such activities because the raw materials came to the defendants through interstate channels and the finished products were, in large part, marketed in other states. The Court, accordingly, held that there was a *direct* effect upon interstate commerce and hence that the manufacturing came within the scope of the Commerce Clause.

National Labor Relations Board v. *Fainblatt,* 306 U. S. 601, was held to come within the same principle. In that case the defendant's business differed from that of the defendants in the earlier cases, in that Fainblatt was

engaged in a purely local enterprise of making up garments, under contract, out of raw materials belonging to others. He sold no merchandise in interstate commerce or otherwise. But, the Court pointed out, the materials with which he made up the garments were shipped to him through channels of interstate commerce and the garments manufactured by him were similarly shipped back through the same channels and were ultimately sold in interstate commerce. The Court held that the matter of legal title to the raw materials or finished products was immaterial and that the determination in the earlier *Labor Relations Board* cases was controlling.

In *Mulford* v. *Smith,* 307 U. S. 38, the question was with respect to the constitutionality of Title III of the Agricultural Adjustment Act of 1938 insofar as it established marketing quotas for flue-cured tobacco. The restrictions were not upon production, but there were quota restrictions with respect to the quantity which each producer might market through a warehouseman. The marketing warehouse was, the Court said, "the throat where tobacco enters the stream of commerce". The Court pointed out that such tobacco is sold at public auction in those warehouses, commingled with tobacco of other producers. The opinion reads:

> "The record discloses that at least two-thirds of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination. In Georgia, nearly one hundred per cent. of the tobacco so sold is purchased by extrastate purchasers. In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective, must, and therefore may constitutionally, apply to all sales."

The distinction between the foregoing cases and the instant case is readily apparent. While, in each instance, the subject matter of the regulation was, at the moment, wholly within the boundaries of a single state, the products produced by the respective defendants were actually destined for ultimate disposition in interstate commerce.

The earlier case of *Stafford* v. *Wallace*, 258 U. S. 495, cited by the Court, clearly shows the same distinction. That was a suit to enjoin enforcement of the Packers and Stockyards Act of 1921 insofar as it provided for supervision and control of stockyard facilities. The appellants claimed that their business was wholly intrastate in character; that the services rendered by them were purely local, even though the livestock may have been transported or was about to be transported in interstate commerce. Chief Justice Taft, writing the opinion of the Court, after pointing out how exorbitant rates and deceptive practices obstructed interstate commerce, said (p. 516):

> "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character."

Chicago Board of Trade v. *Olsen*, 262 U. S. 1, cited in the opinion, was decided on the authority of *Stafford* v. *Wallace*, supra. It involved the constitutionality of the Grain Futures Act of 1922 which placed under Federal control the operation of the boards of trade at which transactions in grain for future delivery in interstate commerce were conducted. It appeared that it was the practice to ship grain to Chicago in interstate commerce with the right of temporary stoppage for storage, inspection, weighing and grading, with privilege of shipping under

a through rate to the Eastern seaboard after sale on the Board of Trade.

Chief Justice Taft stated the problem as follows (p. 36):

> "The question is whether the conduct of such sales is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce in grain. And further, are they such an incident of that commerce, and so intermingled with it, that the burden and obstruction caused therein by them can be said to be direct?"

The Court answered both questions in the affirmative, to the extent at least of saying, as it did in *Stafford* v. *Wallace,* that Congress, having found that the appellant's activities did directly affect interstate commerce, the Court would not substitute its own judgment for that of Congress.

It is to be noted that in the present suit there is no finding of Congress or of the Secretary of Agriculture that wholly intrastate handling does *directly* affect interstate commerce. The order involved in this suit appears to contemplate separate State control over intrastate handling.

The case of *Houston & Texas Railway* v. *United States,* 234 U. S. 342, cited in the *Rock Royal* case, involved the power of the Interstate Commerce Commission to prevent discrimination against interstate shipments by requiring either the increase of intrastate rates to a parity with interstate rates for a haul of the same length, or a proportionate reduction of interstate rates regardless of the reasonableness of the existing interstate rates. Facilities were used in common for both interstate and intrastate shipments. Mr. Justice (now Chief Justice) Hughes said (p. 354):

> "The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury

> upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention."

The distinction, in principle, is obvious.

In the *Minnesota Rate* cases, 230 U. S. 352, cited by Mr. Justice Reed, the Court said (p. 399):

> "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter."

Currin v. *Wallace*, 306 U. S. 1, cited by Mr. Justice Reed, involved the authority of the Federal Government to require the inspection and grading of tobacco in warehouses where the same was stored prior to sale and interstate shipment. The sole question was whether Federal control was prevented by the fact that some of the tobacco, so stored, was intended for local use. The Court pointed out that with the exception of a small quantity used locally, all sales were for interstate shipment and stated that it was well settled that sales for shipment to other states were as much part of interstate commerce as the actual transportation. Mr. Chief Justice Hughes said (p. 11):

> "The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care * * *"

The Government can take little comfort from the language of any of the cases cited in Mr. Justice Reed's opinion. In every case the subject matter of the regulation was a product which had been handled through the channels of interstate commerce, or was destined for immediate transportation in interstate commerce, or had used facilities common to interstate and intrastate commerce.

The present case contains no such element. We urge that the *Rock Royal* case does not support the contention that *all* milk of *all* handlers, however remote from interstate aspects its handling may be, may lawfully be brought within the Federal domain.

Petitioner urges that while the determination of the Circuit Court of Appeals might conform to the broad language of the prevailing opinion in the *Rock Royal* case, it is in conflict with the principles underlying the applicable decisions of this Court as exemplified in the cases cited and in such decisions as the *Schechter* case, supra.

If the existence of competition between interstate and intrastate goods will alone and of itself permit the Federal Government to invoke the Commerce Clause to justify regulation of intrastate handling of intrastate goods, a new and practically unlimited source of Federal power will be tapped. Such construction of the Commerce Clause would permit the Government to regulate the production and sale of practically every commodity, for there are few local commodities, and few local services, which do not enter the market in competition with similar products and similar services having interstate aspects. The construction contended for by the Government would place within Federal control, and exclude from State regulation, practically every phase of local production and industry.

In the *Labor Board Cases,* 301 U. S. 1, the scope of Federal power was limited as follows (p. 37):

"Undoubtedly the scope of this power must be

> considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

We urge upon this Court the proposition that where, as in the case of the petitioner, its product is produced wholly within the State, is handled, sold and consumed wholly within the State, and during no part of its existence is it physically intermingled with similar milk handled in interstate commerce, but continues throughout to retain its own identity, it cannot lawfully be subject to Federal control under the Commerce Clause.

(B) The Construction of the Order.

The *Rock Royal* case involved only the validity of the statute and of the order issued under it. The construction of the Order insofar as it purported to embrace the defendants' activities was not questioned.

The fact that the Order was intended to be part of a joint and concurrent regulation of the marketing of milk in the New York City area would seem to demonstrate that, whatever the power of the Secretary of Agriculture, there was no intent to exercise that power to the complete exclusion of the State of New York from participation in the marketing plan. Yet the Government's contention operates to effectuate such complete exclusion and to make the concurrent and complementary order a mere hollow gesture of authority.

If open market competition causes petitioner's milk to be deemed to be "physically and inextricably intermingled" with interstate milk (Order No. 27, p. 2) then there is no

milk which escapes Federal control. If petitioner's milk is embraced within the purview of the Federal Order, all milk sold in New York City is similarly embraced therein, for it is undisputed that all milk sold in the market is sold on a competitive basis.

Yet the whole structure of the Federal Order is built upon a foundation of concurrent State and Federal control. Petitioner urges that the contention of the Government does violence to the obvious purpose and intent of the Order.

POINT II.

Market conditions prevailing during November and December, 1938, and January, 1939, made the enforcement of the Federal order confiscatory, in violation of the due process clause of the Fifth Amendment.

The minimum price fixed by the Order for Class I (fluid) milk was $2.45 per hundredweight (record, fol. 47). The parties agree that such price can be paid to producers only if the milk can be resold in the wholesale market at 9¾¢ per quart or more. (The Government's statement to that effect is found in the affidavit of Mr. Reed at folio 47. The defendant's statement is found at folios 123-125.) The prevailing wholesale milk price of Class I milk during the period of defendant's non-compliance was as low as 8¢ per quart (fol. 127) on a steadily declining scale. While the 9¾¢ price prevailed, petitioner fully complied. It had long since given way to competitive conditions (fol. 126).

There seems to be no dispute as to the cause of the collapse. Certain handlers (not including the defendant) took the position that the Order was void and unenforceable for the various reasons advanced in the *Rock Royal*

case. Those persons sold their milk in the open market at prices below those which would have prevailed had they been required to comply with the Order and pay their pool obligations. Defendant was at that time in full compliance with the Order. It continued to pay into the pool, at great loss to itself, a total of $44,527.48 (fol. 127). The Government, recognizing the impossibility of maintaining the price structure under such conditions, sought to procure summary enforcement against the non-complying handlers. In its application for a preliminary injunction, the Government stated to the District Court in the *Rock Royal* case

> "it will be impossible for handlers to comply with the order and at the same time meet the competition of the defendants who are violating the order" (fol. 128).

The petitioner, in its own small way, sought to assist the Government in its efforts to procure such enforcement by submitting an affidavit at the Government's request, pointing out with particularity how the price cutting of the non-complying handlers had demoralized the market and forced other handlers to meet the reduced wholesale price (record, fol. 130). When the District Court declined to grant the Government's motion for a preliminary injunction, the stamp of judicial approval was put upon the position of the non-complying handlers.

Mr. Reed, of the Department of Agriculture, summarized the situation in his affidavit in this suit, in which he said (fol. 50):

> "Other handlers were forced to meet these prices in order to retain their business and the general level of prices dropped to disastrously low levels.
>
> The failure of summary enforcement against the defendants together with the resulting disorderly marketing conditions made effective enforcement against other handlers impossible."

Petitioner was among those "other handlers". It had no choice but to sell its milk in the market as it existed. The Government has not suggested that petitioner was responsible for those conditions or contributed to them. The volume of milk handled by petitioner was less than 2% of the total volume sold in the market (fol. 145). The Circuit Court of Appeals recognized petitioner's position and pointed out that three courses were open to it—which the Court characterized as "a hard choice": (1) to conduct its business in compliance with the Order; (2) to cease doing business or (3) to keep on without compliance and run the risk of the consequences.

The latter choice is scarcely within the pale of lawful conduct. The validity of the Order must be tested by the first two alone.

To comply with the Order would have been to court bankruptcy. No handler could pay $2.45 per hundredweight and still sell fluid milk at 8¢. Yet no higher price was available. The period of survival of any handler would be measured by the extent of such handler's resources. Ultimately the entire industry must go bankrupt if such choice were followed. The order was suspended as of January 31st, 1939 for the simple reason that virtually every handler who had a pool obligation under the Order had to take the outlaw position of refusing to comply (fols. 51, 157 to 162).

The only lawful alternative, therefore, was to cease doing business.

That brings us to the vital question: can such an order lawfully be enforced when such enforcement means virtual destruction of an entire industry? The Government recognized that such disaster was imminent when it suspended the operation of the Order as of January 31st, 1939. Logically, since the Government insisted that the Order was valid, there was no reason for such suspension pending the appeal to this Court in the *Rock Royal* case any more

than there is reason to repeal a law pending test of its constitutionality. If the interests of producers required the minimum prices, those interests should not have been sacrificed pending the appeal. Obviously, the Order was suspended in recognition of the confiscatory nature of enforcement under prevailing conditions. Those same conditions, however, existed prior to January 31st, 1939.

The determination of the Circuit Court of Appeals was based upon its construction of this Court's decision in the case of *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163. That case, however, by implication, at least, supports, rather than discredits, our argument.

That case dealt with the New York Milk Control Law (since repealed) which set up fixed minimum prices for every phase of milk marketing, including prices on sales from producers to dealers, on sales from dealers to retail stores, and on sales from retail stores to consumers. The sole question was whether the difference between the fixed minimum prices at which plaintiff was compelled to purchase its milk from producers and the fixed prices at which it could resell it, viz., the "spread", was so inadequate and arbitrary and unreasonable as to be confiscatory. This "spread" the defendant charged was

> "insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business, less depreciation."

Mr. Justice Cardozo, commenting on this claim, said (p. 169):

> "They do not tell us whether the appellant ran its business with reasonable efficiency when compared with others in its calling * * * For all that appears upon this record, a change in the minimum prices would avail the appellant nothing if a corresponding increase or reduction were allowed to its

> competitors. It might still be driven to the wall without the aid of a differential that would neutralize inequalities of capacity or power."

Summarizing the plaintiff's claim, Mr. Justice Cardozo further said (p. 170):

> "The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit."

Rejecting this contention, the Court said (p. 170):

> "True the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self-interest to raise the present level * * * The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to him is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts."

The record in the instant case completely negatives any suggestion that petitioner's position is the result of lack of efficiency, or any other factor which caused petitioner to lag in the competitive race for business to the advantage of a "more efficient or economical" competitor. On the contrary, the record shows that petitioner operates its business with greater efficiency and at less cost than the average handling cost of the largest and most efficient handlers. The details, based upon current Government reports, are shown on page 50 of the record. We take these statements, supported by our own detailed proof, to establish the complete distinction between the facts in this case and those in the *Hegeman Farms* case.

No similar question was raised in the *Rock Royal* case. The Government in its brief in that case pointed out (p. 91):

> "They have not established that the operation of the order has made their business unprofitable or that they operate with reasonable efficiency. There is no evidence that the prices of milk in the sections of the marketing area in which they sell milk are lower than the delivered cost of milk."

Moreover, the defendants in the *Rock Royal* case could scarcely have been heard to complain about market conditions which they themselves created.

Whatever the situation might have been under conditions prevailing in September and October, 1938, there can be no question as to the effect of the Order under conditions prevailing in November and December, 1938, and January, 1939. The price prescribed by Order No. 27 might have been fair and reasonable during the earlier period and might have been wholly confiscatory during the latter period.

As Mr. Justice Roberts said in *Nebbia* v. *New York*, 291 U. S. 502, 525:

> "It results that a regulation valid for one sort of business, *or in given circumstances,* may be invalid for another sort, *or for the same business under other circumstances,* because the reasonableness of each regulation depends upon the relevant facts." (Italics ours.)

May it not be overlooked that the prices for fluid milk fixed by the Order are not in any sense based upon cost of production. It cannot be argued that market prices are irrelevant. The prices fixed by the Order are keyed to the wholesale butter market in New York (see Order No. 27, Article IV, Section 1, Paragraph 1). Presumably some

constant relationship should exist between the wholesale butter price and the wholesale milk price; otherwise there would be no tenable ground for fixing the milk price on a butter basis.

It is to be noted that other classifications of milk under the Order are similarly based upon wholesale prices of related commodities as, for example, the Class III-A price is based upon the wholesale price of evaporated milk; the Class IV-B price upon the cheese market and the like.

Clearly, then, the enforcement of minimum producer prices for fluid milk, when the prescribed price falls out of line with the wholesale market for such product, does violence to the purpose and aim of the Act and of the Order.

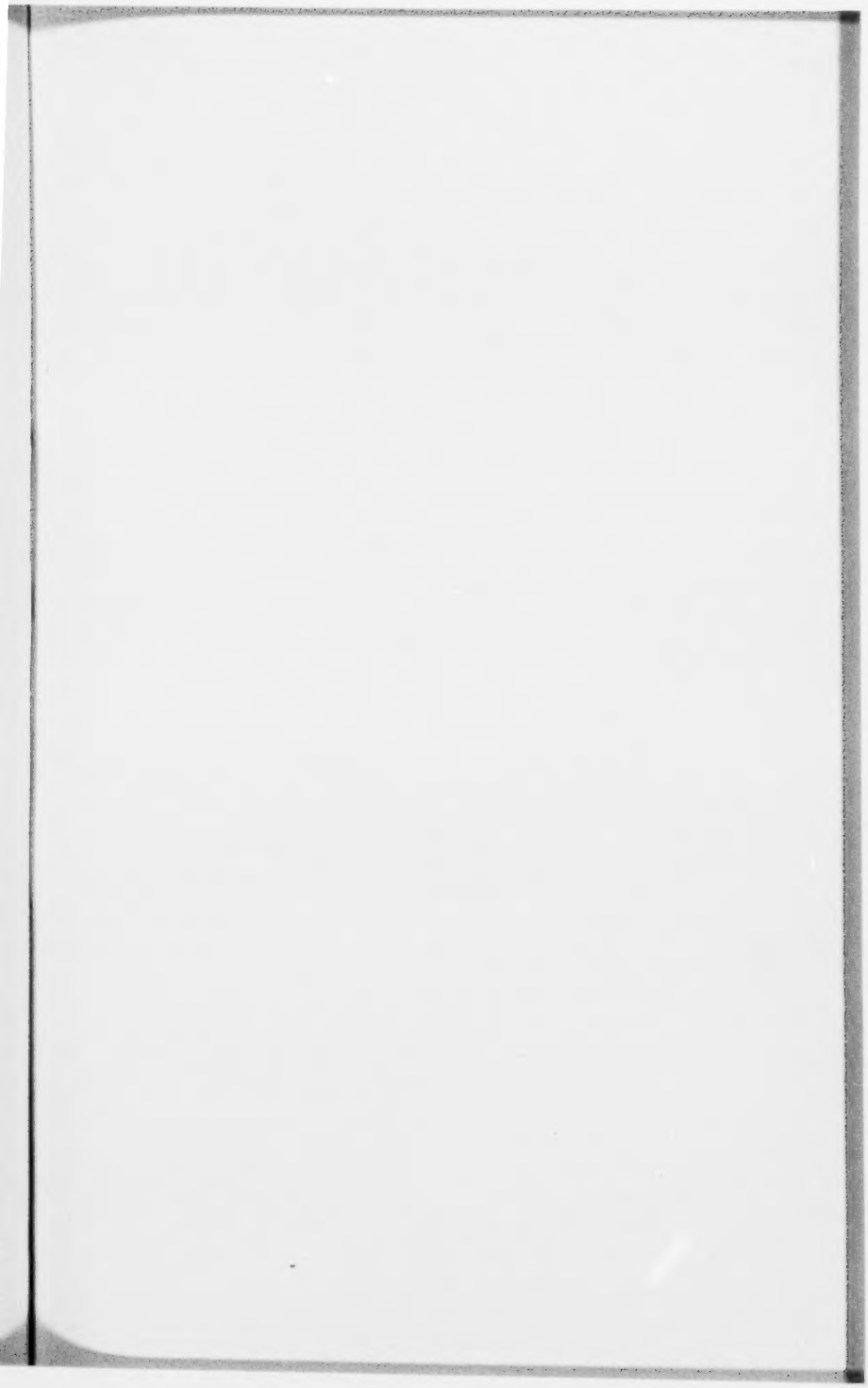
As we have demonstrated, the petitioner had no choice but to sell its milk at prevailing prices. It paid its producers on the basis of such prices. To require petitioner, at this time, to meet the claim of the Government would be confiscation in a most aggravated form.

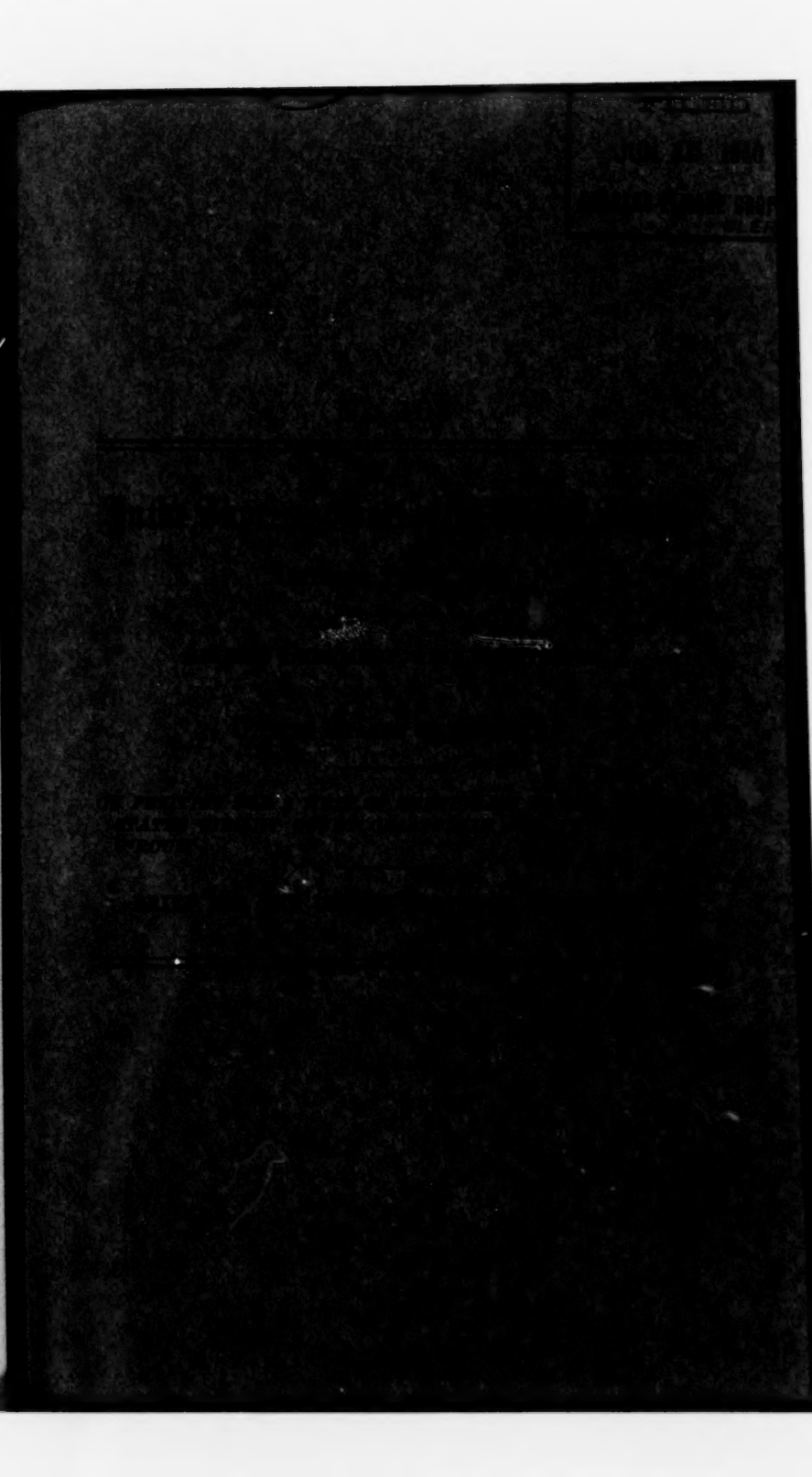
Conclusion.

It is respectfully urged upon this Court that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

SAMUEL RUBIN,
Attorney for Petitioner.





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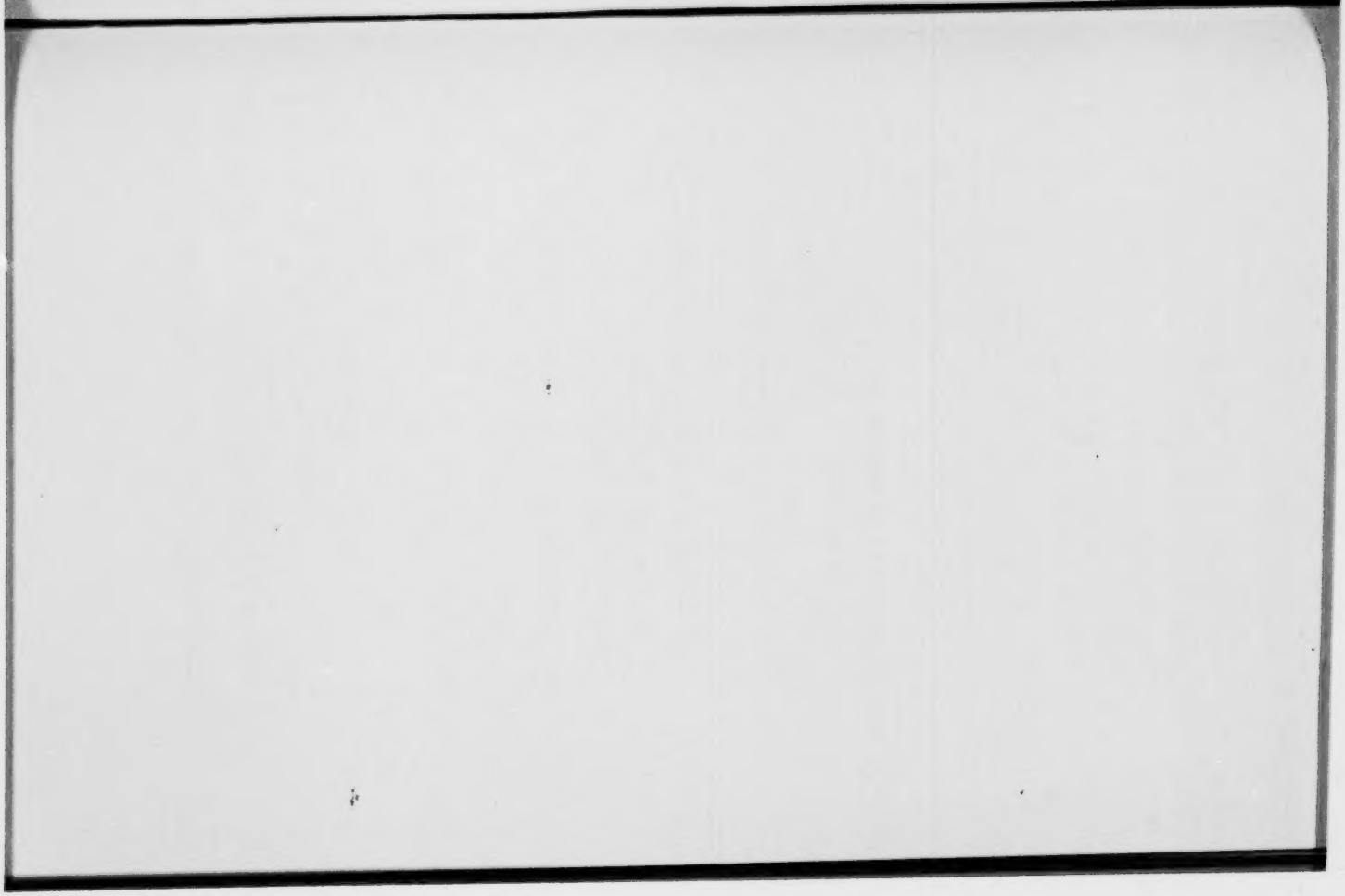

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 103

ADLER'S CREAMERY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 96–97) is reported in 110 F. (2d) 482. That opinion incorporates by reference a prior opinion reported in 107 F. (2d) 987, which was rendered on appeal from a judgment granting a preliminary mandatory injunction.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on April 3, 1940 (R. 98). The petition for a writ of certiorari was filed on May 25, 1940. The

jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the act of Febuary 13, 1925 (28 U. S. C., sec. 347).

STATUTE INVOLVED

The statute involved is the act of May 12, 1933 (c. 25, 48 Stat. 31), as amended May 9, 1934 (c. 263, 48 Stat. 672), as further amended August 24, 1935 (c. 641, 49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246; 7 U. S. C. Supp. V, sec. 601 *et seq.*) (hereinafter referred to as the "Act"). A compilation of the Act is attached to this brief as an appendix.

QUESTIONS PRESENTED

1. Whether the Act authorizes the regulation of milk handled without crossing State lines but which is sold in competition with milk which moves in interstate commerce.

2. If such regulation is authorized by the Act, is it within the constitutional power of Congress?

3. If the regulation is otherwise valid, is petitioner deprived of property without due process of law by being compelled to obey the regulation during a period when competitive conditions make it economically unprofitable to do so?

STATEMENT

On July 25, 1939, the respondent, pursuant to the provisions of section 8a (6) of the Act, filed a complaint in the United States District Court for the

Northern District of New York seeking both a preliminary and a permanent injunction to restrain the petitioner from violating, and to compel the petitioner to comply with, the provisions of Order No. 27 (hereinafter referred to as the "order"), issued pursuant to the Act by the Secretary of Agriculture of the United States on August 5, 1938, effective September 1, 1938 (R. 5). The order regulates such handling of milk produced for sale in the New York metropolitan marketing area as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce.[1] The order was suspended effective January 31, 1939, but was reinstated effective July 1, 1939, and, with amendments not material to this case, has since been continuously in full force and effect. (R. 5.)

The petitioner answered the complaint admitting the issuance of the order by the Secretary in full compliance with the Act, admitting that it was engaged in the handling of milk, or cream therefrom, which was received at plants approved by the duly authorized local health authorities for the receiving of milk to be sold in the marketing area, admitting that it had filed with the Market Administrator created by the order the reports required,

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[1] See Article I, Section 1 (6) of the order which appears in the record as Exhibit A to the complaint (opposite R. 10). The terms of the order are fully described in the opinion of this Court in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

and admitting that it had not made the required payments to the Market Administrator for November and December 1938 and January 1939 as required by the order. The petitioner's answer contained four affirmative defenses, two of which are now pertinent: (1) that the Act and the order were not applicable to the petitioner, or to the milk handled by it because all of the milk handled by the petitioner was produced in the State of New York, processed at plants in the State of New York, and transported to the marketing area by routes wholly within the State of New York; (2) that petitioner would be deprived of property without due process of law if required to pay for its milk the price to producers fixed by the order during a period when competitive conditions in the unregulated retail market were such that petitioner was unable to resell the milk at a profit.[2] (R. 19–27.)

[2] In substance petitioner alleged that at the time the order became effective the sale of fluid milk and cream in the marketing area was intensely competitive; that certain of petitioner's competitors supplying substantial quantities of fluid milk and cream to the marketing area contested the validity of the act and the order and, by refusing to pay the prescribed minimum prices, were able to sell, and did sell, fluid milk and cream in the marketing area at prices which petitioner, although efficiently managed and operated, could not meet if petitioner complied with the order by paying to producers the prescribed minimum prices; that the Government sought to compel compliance with the order on the part of these competing handlers (the appellees in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533) but the District Court declined to compel such compliance; that

The case was first presented to the District Court on respondent's motion for a mandatory injunction *pendente lite*. That motion was granted and petitioner appealed. Upon that appeal the Court of Appeals reviewed the substantive questions now sought to be raised, deciding those questions adversely to petitioner, but held that a preliminary injunction was not an appropriate remedy. The court suggested that in the circumstances a motion for summary judgment might properly be entertained. *United States* v. *Adler's Creamery, Inc.*, 107 F. (2d) 987.

On September 21, 1939, respondent moved for summary judgment under Rule 56 of the Rules of Civil Procedure for District Courts of the United States, upon the complaint, answer, and affidavits filed by the respective parties (R. 30–32).

On November 28, 1939, the District Court filed its findings of fact and conclusions of law (R. 72–76) and entered final judgment (R. 77–78) (a) enjoining petitioner from violating the order and (b) mandatorily enjoining and commanding petitioner to comply with the order, and, particularly, to pay to the Market Administrator $46,796.66 found to be due and owing for the period from the effective date of the order to January 31, 1939.

---

petitioner had complied with the order for the months of September and October 1938; that its noncompliance for the months of November and December 1938 and January 1939 was forced upon it by the refusal of the District Court to compel compliance by other handlers (R. 23–26).

Petitioner appealed from the judgment to the United States Circuit Court of Appeals for the Second Circuit and on March 18, 1940, that court, in a *per curiam* decision, affirmed the judgment of the District Court (R. 96–97).[3]

ARGUMENT

Petitioner presents no question which merits consideration by this Court. The decision of the court below is directly controlled by the decisions of this Court in *United States* v. *Rock Royal Co-op,* 307 U. S. 533; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588; and *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163. There is no conflict between the various circuit courts of appeals on the questions which petitioner seeks to present.

[3] While the case was pending in the District Court, Holton V. Noyes, Commissioner of Agriculture and Markets of the State of New York, with leave of court (R. 88) intervened and sought an injunction requiring the petitioner to comply with Official Order No. 126 (which appears in the record opposite page 60), issued September 1, 1938, pursuant to article 21, section 258–m of the Agriculture and Markets Law of the State of New York (c. 383, Laws of 1937), if the court should find that the petitioner was not subject to the federal order (R. 78–87). On December 4, 1939, the District Court denied petitioner's motion to dismiss the intervening complaint (R. 91), and petitioner's appeal from the order denying the motion was dismissed by the United States Circuit Court of Appeals for the Second Circuit (R. 98). Petitioner does not seek a review of the action of the District Court in this respect.

Cf. *H. P. Hood & Sons* v. *United States,* 97 F. (2d) 677 (C. C. A. 1st); *Wallace* v. *Hudson-Duncan & Co.,* 98 F. (2d) 985 (C. A. A. 9th). The only authority which petitioner suggests as supporting its position is the obviously inapplicable decision of this Court in *Schechter Corp.* v. *United States,* 295 U. S. 495.

1. Section 8c (1) of the Act authorizes the Secretary of Agriculture to issue orders regulating the handling of milk which "is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce" in milk. Petitioner's milk is marketed in the New York City area, and is in active competition with that milk, amounting to about 50 percent of the total, which moves to New York City across state lines (R. 74). Petitioner necessarily concedes that the marketing of its milk is inextricably connected with the marketing of that milk which physically moves in the current of interstate commerce. This is the consequence of its subsequent attempt to invoke the due-process clause because it was economically impossible for petitioner to abide by the order and compete with those interstate handlers who, encouraged by the refusal of a district court to compel obedience to the order, refused to obey it. Conversely, the granting of a competitive advantage by relieving petitioner from

the necessity of observing the order would directly burden, obstruct, and affect interstate commerce in milk. It follows that even though the milk which petitioner handles does not move in interstate commerce, it is embraced by the terms of the statute and is subject to regulation.

In its supporting argument petitioner suggests that the order was not intended to regulate handlers who handled no milk which actually crossed state lines. Petitioner's speculations as to intent are entitled to little weight in view of the fact that the order by its terms is as broad in application as the authority prescribed in the Act.[4]

2. Petitioner's attack upon the constitutional authority of Congress to regulate commerce which does not move across state lines in order to make effective the regulation of interstate commerce is answered by numerous decisions of this Court. *Houston & Texas Ry.* v. *United States,* 234 U. S. 342; *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Labor Board Cases,* 301 U. S. 1; *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Rock Royal Co-op,* 307 U. S. 533.

The question as it relates to the milk industry was definitely settled by the decision in the *Rock*

[4] Compare Section 8c (1) of the Act with Art. I, Sec. 1 (6) of the order which is inserted immediately following page 10 of the record.

Royal case. Petitioner attempts to distinguish that decision by pointing to the Court's statement that the milk of all handlers involved reached the market "through the channels of interstate commerce." This phrase could not have been intended to mean that all of the handlers were handling milk *transported* in interstate commerce, for one of the appellees contended, without challenge, that its milk moved only intrastate.[5]

3. Petitioner's claim that it should be relieved of compliance with the order as to the months of November and December 1938 and January 1939 because of the difficulty of compliance in the face of the competitive conditions then prevailing in the market is without merit. The same question was necessarily before this Court in the *Rock Royal case.* There, the appellees had failed and refused to pay similar obligations accruing during the same months. The opinion of this Court specifically

[5] Central New York Co-operative Association, Inc., alleged in its answer that (*Rock Royal* record, No. 771, 826, October Term, 1938, p. 80):

> All milk handled by this defendant is sold in the State of New York and none of the milk handled by this defendant crosses state lines at any time, nor is such milk handled by this defendant mixed with milk which has crossed state lines or has been produced in other states and none of the milk handled by this defendant is at any time in the current of interstate commerce nor does any of the milk handled by this defendant at any time affect, interfere with, burden, or obstruct interstate commerce.

directed the court below to enter an order which would require the appellees to make the payments demanded. Petitioner suggests no reason, except that it had for a time complied with the order, which would justify according it more favorable treatment. Petitioner's entire argument is based on the contention that competitive prices in the unregulated retail market were so low that it could not afford to pay the farm price to producers which was fixed by the order. The due-process clause does not protect business from the hazards of competition. *Hegeman Farms Corporation* v. *Baldwin,* 293 U. S. 163. The fact that the competition was made possible through violations of the Secretary's order gives petitioner no special immunity from its hazards.

Finally, if the prices fixed were too high or if legal reasons existed for exempting petitioner from complying with the order, administrative machinery was available by which petitioner could have obtained relief (Section 8c (15) of the Act). No claim is made that petitioner ever sought to avail itself of that administrative remedy. Consequently, petitioner has no standing now to present such questions to the courts. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41.

CONCLUSION

The questions presented were correctly decided by the court below and have been settled by the

decisions of this Court. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

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THURMAN ARNOLD,
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JAMES C. WILSON,
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JUNE 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

UNITED STATES DEPARTMENT OF AGRICULTURE
DIVISION OF MARKETING AND MARKETING AGREEMENTS

COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

(Including Amendments of the
76th Congress, 1st Session)

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1939

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session, 7 U. S. C. A. 674, 50 Stat. 249), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the footnotes. References to recent amendments to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 are contained in the footnotes.

COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED[1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy):

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such

[1] For annotations to the Agricultural Adjustment Act, as amended; for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

orderly marketing conditions for agricultural commodities in interstate commerce as will establish[3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating[4] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to deter-

[3] The italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

[4] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

mine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the terminations of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores *and the products of honeybees*),[5] or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples, *other than apples produced in the States of Washington, Ore-*

[5] The words "and the products of honeybees" were inserted by public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.

gon, and Idaho,[6] and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops,[7] honeybees,[8] and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the

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[6] The words ", other than apples produced in the States of Washington, Oregon, and Idaho," were added by Public, No. 98, 76th Congress, Chapter 157, 1st session, approved May 31, 1939.

[7] The word ", hops," was inserted by and the following provision was contained in Public, No. 482, 75th Congress, Chapter 143, 3d session, approved April 13, 1938:

"SEC. 3. No order issued pursuant to section 8c of the Agricultural Adjustment Act, as amended, shall be applicable to hops except during the two crop years next succeeding the date of enactment of this Act."

The provision quoted was amended by Public, No. 91, 76th Congress, Chapter 150, 1st session, approved May 26, 1939, to read as follows:

"SEC. 3. No orders issued pursuant to section 8c of the Agricultural Adjustment Act, as amended, shall be applicable to hops after September 1, 1942."

[8] The word "honeybees," was inserted by Public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.

case of orders covering milk products only, such provision is approved or favored by at least three-fourth of the producers who, during a representative period determined by the Secretry of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[9] *of* milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making

[9] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples, *other than apples produced in the States of Washington, Oregon, and Idaho*,[10] and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, *hops*,[11] *honeybees*,[12] and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts[13] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by*[14] such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets

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[10] Public, No. 98, 76th Congress, Chapter 157, 1st session, approved May 31, 1939.
[11] Public, No. 482, 75th Congress, Chapter 143, 3d session, approved April 13, 1938.
[12] Public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.
[13] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.
[14] The italicized words were substituted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agirculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

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(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating

to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional pro-

duction areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: Provided, That such majority have,

during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[15]

[15] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[16]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a num-

[16] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement act of 1937.

ber of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2)[17] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority

[17] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[18] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[19]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any

[18] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[19] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes

Territory, the District of Columbia, possession of the United States, and foreign nations.[20]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions[21] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the market for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000; Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and book of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22 (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States under such conditions and in sufficient quantities as to render or tend

[20] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[21] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision therof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[22]

Sec. 2. The following provisions, reenacted in section 1 of this act, are amended as follows: [23]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

[22] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title," wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended,"; and by deleting the words "an adjustment" whenever they appeared, and inserting in lieu thereof the word "any."

[23] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in the footnotes.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

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